Lim Chiew v Siteman Construction Sdn Bhd (Lee Chao Yong, applicant)

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D-28NCC-186 OF 2010
LAU BEE LAN J
30 MARCH 2017

Companies and Corporations — Liquidators — Appeal against decision of liquidator — Petitioner brought winding up proceeding against respondent — Applicant filed application to stay winding up proceeding pending appeal — Petitioner filed two proof of debt — Liquidator admitted proof of debt filed by petitioner — Applicant filed application pursuant to s 279 of the Companies Act 1965 — Whether there were issues on res judicata and laches — Whether application under s 279 of the Companies Act 1965 proven — Whether petitioner's claim under proof of debt proven — Companies Act 1965 s 279

Lim Chiew ('the petitioner') brought two suits namely Suit No 1319 and Suit No 123 against Siteman Construction Sdn Bhd ('the respondent'). A judgment was entered in favour of the petitioner in Suit No 1319 but Suit No 123 was withdrawn. Upon winding up of the respondent, two proof of debt ('POD') was filed by the petitioner for a total sum of RM6,893,838.23. The two POD were filed pursuant to the judgment obtained in Suit Nos 1319 and 123 respectively. In the present action ('encl 97'), Lee Chao Yong ('the applicant') made an application pursuant to s 279 of the Companies Act 1965 ('the Act') and/or the inherent jurisdiction of the court for the following orders: (a) Mr Subramaniam a/l AV Sankar's ('the liquidator') approval of the POD filed by the petitioner be reversed and modified; (b) the costs of the present action to be borne and paid by the liquidator to the applicant forthwith; and (c) any further orders and/or other reliefs as the court deems fit and proper in the circumstances of the case. In resisting encl 97, the petitioner and the respondent submitted on res judicata and laches. In relation to this, the petitioner and the respondent submitted that the applicant was guilty of delay in filing encl 97. The petitioner and the respondent also submitted that the applicant's grounds for encl 97 had been raised and ventilated in encl 93 ie the applicant's application to stay the winding up proceedings of the respondent which was fully argued and dismissed by the court on 11 August 2016. Therefore, the applicant was estopped from raising the same issues again in encl 97. Further, the petitioner and the respondent submitted that the applicant had failed to prove his case under s 279 of the Act.

Held, allowing encl 97:

(1) The test in the application under s 243 of the Act was not 'special circumstances'. The test applicable was different from the application under s 279 of the Act. In the application under s 279 of the Act, the test was whether the liquidator acted in a manner no reasonable liquidator would have acted in the circumstances. Since the tests applied were different, the issue of res judicata did not apply. Further, given that the applicant had withdrawn his appeal in respect of encl 93, the contention that the application under s 279 of the Act would amount to a collateral challenge on the court's decision in the stay application was a non-issue (see paras 25 & 31).

(2) The applicant was only adjudged a creditor on 15 December 2013. That was the earliest date the applicant was clothed with the requisite locus standi. Neither the liquidator nor the applicant had shown prejudice to them or asserted that they relied on the applicant's lack of action and they had altered their position as such. Thus, there was no evidence of laches (see paras 35–36).

(3) There could not be acquiescence as: (a) there had been no distribution of dividend of the respondent to date; (b) the liquidator had not conducted a proof of debt exercise as required under s 291 of the Act and in accordance with rr 91–100 of the Companies (Winding-Up) Rules 1972; and (c) the liquidator had not completed the verification of the applicant's POD and that of Foremost Systems Sdn Bhd and Deck Master Sdn Bhd (see para 37).

(4) The law governing amendment to pleadings did not apply to an application under s 279 of the Act. What was material in the application was the affidavit in support affirmed by the applicant on 11 July 2016 provided the grounds relied on by the applicant. There was no lack of particularisation in the affidavit in support of the application under s 279 of the Act as the liquidator could not and did not know what factors the liquidator had allegedly considered when accepting the petitioner's POD until the liquidator disclosed for the first time, the copy of the petitioner's POD in the liquidator's reply affirmed by the liquidator on 29 July 2016 when it only then evident that the liquidator relied on the statement of claim in Suit No 123 (see para 41).

(5) The submission that the petitioner's claim was genuine could not be sustained. The petitioner's claim in Suit No 123 was accompanied only by the statement of claim in Suit No 123. Whilst the liquidator contended he carried out investigations in respect of the petitioner's POD, the court found no particulars of the alleged investigations had been provided. The 'breakdown of construction costs' could not be deemed as proof of the petitioner's claim as: (a) the author of the document was unknown; (b) it had not been verified nor certified by an engineer, architect or quantity surveyor; and (c) it did not show the

alleged profits of RM6,334,674.51 due to the petitioner in any manner whatsoever. The said document was at best a self-serving document (see paras 46–47).

(6) There was significance in the fact that the entire suit was withdrawn against all the defendants in Suit No 123. This was because RM1.1m was paid to the petitioner in settlement of Suit No 123. The sum of RM6,333,674.51 claimed under the POD should at the very least have the sum of RM1.1m deducted or alternatively, the entire claim had been settled or compromised by the petitioner's acceptance of the said sum of RM1.1m. This was not considered by the liquidator (see para 49).

[Bahasa Malaysia summary

Lim Chiew ('pempetisyen') telah memfailkan dua tindakan iaitu Guaman No 1319 dan Guaman No 123 terhadap Siteman Construction Sdn Bhd ('responden'). Penghakiman yang memihak kepada pempetisyen telah dimasukkan bagi Guaman No 1319 tetapi Guaman No 123 telah ditarik balik. Apabila responden digulungkan, dua bukti hutang ('BH') telah difailkan oleh pempetisyen bagi jumlah RM6,893,838.23. Kedua-dua BH tersebut difailkan berdasarkan penghakiman yang diterima dalam Guaman No 1319 dan Guaman No 123. Dalam tindakan semasa ('lampiran 97'), Lee Chao Yong ('pemohon') membuat permohonan di bawah s 279 Akta Syarikat 1965 ('Akta') dan/atau bidang kuasa inherens mahkamah bagi perintah-perintah berikut: (a) kebenaran daripada Encik Subramaniam a/l AV Sankar ('pelikuidasi') bagi BH yang difailkan oleh pempetisyen diakas dan diubah; (b) kos bagi tindakan semasa ditanggung dan dibayar oleh pelikuidasi kepada pemohon dengan segera; dan (c) apa-apa perintah selanjutnya dan/atau relif lain yang dianggap wajar dan sesuai oleh mahkamah dengan keadaan kes semasa. Dalam membantah lampiran 97, pempetisyen dan responden berhujah berkenaan res judicata dan kelewatan. Berkaitan dengan ini, pempetisyen dan responden berhujah bahawa pemohon bersalah kerana lewat memfailkan lampiran 97. Pempetisyen dan responden juga berhujah bahawa alasan pemohon bagi lampiran 97 telah dibangkitkan dan dibincangkan dalam lampiran 93 iaitu permohonan pemohon untuk menggantung prosiding pergulungan responden yang telah dibicarakan sepenuhnya dan ditolak oleh mahkamah pada 11 Ogos 2016. Oleh itu, pemohon dihalang daripada membangkitkan isu yang sama di dalam lampiran 97. Selanjutnya, pempetisyen dan responden berhujah bahawa pemohon telah gagal membuktikan kesnya di bawah s 279 Akta.

Diputuskan, membenarkan lampiran 97:

(1) Ujian bagi permohonan di bawah s 243 Akta bukanlah 'keadaan khusus'. Ujian yang terpakai adalah berlainan dengan permohonan di bawah s 279 Akta. Dalam permohonan di bawah s 279 Akta, ujian yang terpakai adalah sama ada pelikuidasi bertindak dengan cara yang tidak akan

dilakukan pelikuidasi yang munasabah dalam keadaan tersebut. Memandangkan ujian yang terpakai adalah berbeza, maka isu res judicata tidak terpakai. Selanjutnya, pemohon telah menarikbalik rayuannya bagi lampiran 93, oleh itu, dakwaan bahawa permohonan di bawah s 279 Akta adalah cabaran kolateral terhadap keputusan mahkamah dalam permohonan pergantungan tidak lagi menjadi isu (lihat perenggan 25 & 31).

(2) Pemohon hanya menjadi pemiutang pada 15 Disember 2013. Tarikh tersebut merupakan tarikh terawal pemohon mempunyai locus standi yang diperlukan. Kedua-dua pelikuidasi dan pemohon tidak menunjukkan terdapat prejudis terhadap mereka atau mendakwa bahawa mereka bergantung kepada kekurangan tindakan oleh pemohon dan mereka telah mengubah kedudukan mereka seperti itu. Oleh itu, tiada keterangan yang membuktikan kelewatan (lihat perenggan 35–36).

(3) Tidak terdapat persetujuan kerana: (a) tidak terdapat pengagihan dividen responden sehingga kini; (b) pelikuidasi belum membuat pelaksanaan bukti hutang seperti yang diperuntukkan di bawah s 291 Akta dan berdasarkan kk 91–100 Kaedah-Kaedah (Penggulungan) Syarikat 1972; dan (c) pelikuidasi belum membuat pengesahan bukti hutang pemohon dan bukti hutang Foremost System Sdn Bhd dan Deck Master Sdn Bhd (lihat perenggan 37).

(4) Undang-undang yang mentadbir pindaan pliding tidak terpakai bagi permohonan di bawah s 279 Akta. Apa yang penting di dalam permohonan tersebut adalah afidavit sokongan yang disahkan oleh pemohon pada 11 Julai 2016 mempunyai alasan pemohon. Tidak terdapat kekurangan perincian di dalam afidavit sokongan bagi permohonan di bawah s 279 Akta kerana pelikuidasi tidak mengetahui faktor-faktor yang didakwa diambil kira oleh pelikuidasi apabila menerima bukti hutang pempetisyen sehinggalah pelikuidasi mendedahkan buat pertama kalinya salinan bukti hutang pempetisyen di dalam jawapan pelikuidasi yang telah disahkan pada 29 Julai 2016 dimana hanya ketika itu dibuktikan bahawa pelikuidasi bergantung kepada pernyataan tuntutan dalam Guaman No 123 (lihat perenggan 41).

(5) Hujahan bahawa tuntutan pempetisyen adalah jujur tidak boleh dikekalkan. Tuntutan pempetisyen di dalam Guaman No 123 hanya disertai dengan pernyataan tuntutan dalam Guaman No 123. Walaupun pelikuidasi mendakwa bahawa dia telah menjalankan penyiasatan berkaitan dengan bukti hutang pempetisyen, namun mahkamah mendapati bahawa perincian berkaitan dakwaan penyiasatan tersebut tidak dibekalkan. 'Pecahan kos pembinaan' tidak boleh dianggap sebagai bukti tuntutan pempetisyen kerana: (a) penulis dokumen tersebut tidak diketahui; (b) ianya tidak disahkan oleh jurutera, arkitek atau juruukur

kuantiti; dan (c) ia tidak menunjukkan keuntungan RM6,334,674.51 seperti yang didakwa yang perlu dibayar kepada pempetisyen dalam apa-apa keadaan sekalipun. Dokumen tersebut hanyalah dokumen kendiri (lihat perenggan 46–47).

(6) Terdapat kepentingan di dalam fakta bahawa keseluruhan guaman telah ditarik balik terhadap kesemua defendan dalam Guaman No 123. Ini kerana RM1.1 juta telah dibayar kepada pempetisyen dalam penyelesaian Guaman No 123. Jumlah RM6,333,674.51 yang dituntut di dalam bukti hutang tersebut sekurang-kurangnya patut menolak jumlah RM1.1 juta tersebut atau secara alternatif, keseluruhan tuntutan tersebut diselesaikan atau dikompromikan oleh penerimaan pempetisyen bagi jumlah RM1.1 juta tersebut. Ini tidak diambil kira oleh pelikuidasi (lihat perenggan 49).]

Notes

For cases on liquidators in general, see 3(1) *Mallal's Digest* (5th Ed, 2015 Reissue) paras 551–562.

Cases referred to

Abd Hamid Zakaria & Anor v Rimau Indah Sdn Bhd [2016] MLJU 1835; [2016] 1 LNS 410, HC (refd)

Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor [2007] 3 MLJ 571; [2007] 7 CLJ 516, HC (refd)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202; [1989] 1 CLJ 693, HC (refd)

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12; [2007] 2 CLJ 405, CA (refd)

Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor [2016] 5 MLJ 242; [2016] 2 AMCR 174, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Bell v Holmes [1956] 1 WLR 1359 (refd)

Chandran G Nair & Ors v Affin Bank Bhd [2015] 1 MLJ 59, CA (refd)

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252; [1989] 1 CLJ Rep 378, HC (refd)

Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228, CA (distd)

Chew Choo Sing @ Chiew Peng Ann v Chew Brothers Development Corporation Sdn Bhd & Ors [2007] 8 MLJ 393; [2007] 9 CLJ 81, HC (refd)

Chin Ah Keow @ Chin Lai Sitt v Anggun Pintas Sdn Bhd & Ors [2005] 4 MLJ 747; [2005] 4 AMR 464, HC (refd)

Choong Howei v Cheah Choo Eng & Ors and another appeal [2015] 6 MLJ 95; [2015] 9 CLJ 689, CA (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2015] 8 CLJ 1, FC (refd)

Joseph bin Paulus Lantip & Ors v Unilever Plc [2012] MLJU 1759; [2012] 7 CLJ 693, FC (folld)
Koh Huat Kwan v Pegawai Penerima selaku pelikuidasi bagi Poh Mah Housing Development Sdn Bhd & Ors [2015] 5 MLJ 323; [2015] 7 CLJ 16, CA (refd)
Lim Teow Yong & Sons Sdn Bhd v Infolity Sdn Bhd & Anor [2015] MLJU 2312; [2015] 1 LNS 311, HC (refd)
Mahindar Singh v Amanah Saham Pahang Bhd & Anor [1984] 2 CLJ Rep 205, HC (refd)
Seok Mee Seong v Abdul Wahab bin Abdul Rahman [1989] 1 MLJ 193; [1988] 2 CLJ Rep 415, HC (refd)
Tay Choo Foo v Harrisons Holdings (M) Bhd [2001] MLJU 105; [2001] 4 CLJ 52, HC (refd)
Tractors Malaysia Bhd v Charles Au Yong [1982] 1 MLJ 320, FC (refd)

Legislation referred to

Australian Corporations Act 2001 [AUS] s 168(5)
Companies Act 1965 ss 226(3), 236(3), 243, 279, 291
Companies (Winding-Up) Rules 1972 rr 91, 92, 93, 94, 95, 96, 97, 98, 99, 100
Rules of the High Court 1980 O 12 r 7, O 18 r 19(1)

Amrit Pal Singh (Amrit & Co) for the petitioner.
Kelvin Seet (Ryan Ng with him) (Cheang & Ariff) for the respondent.
Mark Ho (Jananee Gopal with him) (Chellam Wong) for the applicant.

Lau Bee Lan J:

INTRODUCTION

[1] Enclosure 97 is the applicant, Lee Chao Yong's application vide notice of motion dated 11 July 2016 made pursuant to s 279 of the Companies Act 1965 ('the CA 1965') and/or the inherent jurisdiction of the court for the following orders:

(a) Mr Subramaniam a/l AV Sankar's approval of the proof of debt ('the POD') filed by Lim Chiew be reversed and modified;

(b) the costs of this motion to be borne and paid by the liquidator to the applicant forthwith; and

(c) any further orders and/or other reliefs as the court deems fit and proper in the circumstances of this case.

('encl 97 application/s 279 application' as the case maybe.)

[2] On 11 October 2016, I had allowed encl 97 and ordered the following:

(a) in respect of the POD dated 21 June 2010 in the sum of RM6,893,838.23, the court orders only for the sum of RM6,334,674.51 be subject to determination by court;

(b) the liquidator be directed to apply to the court for such determination;

(c) all payments of dividend and distribution assets of the respondent company be stayed pending final determination by court referred to in prayer (a); and

(d) cost in the cause of the determination referred to in prayer (a).

[3] Vide notices of appeal filed on 3 November 2016 and 4 November 2016, the petitioner, Lim Chiew and the liquidator for the respondent are now appealing to the Court of Appeal against the said decision. The reasons for my decision are set out below.

FACTS OF THE CASE

[4] The applicant is the creditor of the company.

[5] Prior to the winding-up of the company, Lim Chiew, an alleged creditor of the company brought two suits, namely Kuala Lumpur High Court Civil Suit No D3–22–1319 of 2008 ('Suit No 1319') and Kuala Lumpur Suit No D6–22–123 of 2008 ('Suit No 123') against the company. A judgment was entered in relation to an amount due and owing to Lim Chiew in Suit No 1319 for the amount of RM735,000. However, Suit No 123 was withdrawn.

[6] Consequently, Lim Chiew filed a winding up petition putting the company in liquidation. Upon the winding up of the company, Mr Subramaniam a/l AV Sankar was appointed by the court as the liquidator.

[7] Subsequent to the winding-up, two POD's was filed by Lim Chiew, for a total amount of RM6,893,838.23. The two POD's were filed pursuant to the judgment obtained in Suit No 1319 and Suit No 123 respectively. The POD filed in relation to an alleged judgment for Suit No 123 was for the amount of RM6,334,674.51.

THE APPLICANT'S ARGUMENT

[8] Lim Chiew's claim in Suit No 123 was never proven. The nature of his claim, ie being that based on fraud and loss of profits, require proof and substantiation. It is not a debt and thus, the POD is invalid.

[9] Suit No 123 was withdrawn before judgment. Hence, the POD filed was not by virtue of a judgment delivered. A

[10] The liquidator had not discharged his duty towards the court as a court appointed liquidator in that he had failed to investigate and/or examine the affairs of the company in relation to the POD diligently and thoroughly. B

THE PETITIONER'S ARGUMENT

[11] The applicant is guilty of delay of approximately three years and nine months in filing this application. The applicant was aware of the admission of POD since 8 October 2012 and this motion was only filed on 11 July 2016 without any explanation for the delay. C

[12] The applicant's grounds for this motion have been raised and ventilated in encl 93 ie applicant's application to stay the winding up proceedings of the respondent which was fully argued and dismissed by this court on 11 August 2016. Hence, the applicant is estopped from raising the same issues again in this application. D

[13] The applicant has on 8 September 2016 filed an appeal to the Court of Appeal against the dismissal of encl 93. The Court of Appeal will hear the same complaint by the applicant. The applicant cannot request two different courts to adjudicate upon the same subject matter as it is improper and abusive. E

THE LIQUIDATOR FOR RESPONDENT'S ARGUMENT F

[14] Material background facts:

(a) on 11 June 2010, the respondent was wound up by the petitioner and Subramaniam a/l AV Sankar was appointed as a liquidator; G

(b) on 21 June 2010, the petitioner informed the court in Suit No 123 about the winding up of respondent and withdrew his claim only against the respondent with a view of filing the POD with the liquidator. Suit No 123 proceeded against the other defendants with respect to their personal liability; H

(c) on the same day, the petitioner filed the POD against the respondent for the sum of RM6,893,838.23; and

(d) upon the receipt of the POD, the liquidator carried out an investigation for the purpose of examining the POD and it was discovered that: I

(i) on 7 October 2009, the petitioner obtained a judgment in the sum of RM735,000 in Suit No D3-22–1319 of 2008 ('Suit No 1319') against the respondent;

(ii) the petitioner had brought garnishee proceeding against the respondent's bank account for a sum of RM264,036.28. Thus, the petitioner's POD only includes RM559,163.72 out of the judgment sum in Suit No 1319;

(iii) with respect to the remainder of the POD sum, ie RM6,334,674.51, there was a joint venture agreement ('the JVA') entered between the respondent and the petitioner for the construction of Kuala Lipis factory whereby: (i) the petitioner would provide a sum of RM7,500,000 as capital; and (ii) the petitioner and the respondent agreed to divide the net profit made from the construction on a 50:50 basis;

(iv) the sum RM6,334,674.51, which constitutes the amount claimed by the petitioner in Suit No 123, is supported by a breakdown of the construction costs which detailed the profits made from the construction and all payments made by the respondent as costs of the construction under the JVA. The details of the sum of RM6,334,674.51 are set out in the statement of claim; and

(v) a former director of the respondent, namely Michael Yong has confirmed the amounts stated in the breakdown of the construction costs and the amount due to the petitioner, ie RM6,334,674.51 under the JVA and as claimed in Suit No 123.

[15] The applicant has failed to prove his case under s 279 of the CA 1965. The applicant has not adduced any credible evidence nor proven that the liability referred to in the POD is not a true liability of the company enforceable against it; and that the liquidator has not acted correctly in admitting the POD.

[16] The principles governing an application under s 279 of the CA 1965 are well settled. The court is reluctant to interfere with the decision of the liquidator who has been vested with the discretion by statute.

[17] The claim in the POD is true and genuine and the liquidator has rightly admitted the POD after carrying out an investigation.

[18] The withdrawal of Suit No 123 does not affect the liquidator's decision on the POD. It is trite law that upon the compulsory winding up of a company, all actions against the company will be stayed. This can be found under s 226(3) of the CA 1965. In furtherance of that section, upon winding up, a creditor has a choice whether (a) to proceed with a civil suit; or (b) to file a proof of debt under the winding up proceedings.

[19] The settlement between the petitioner and the former directors in Suit No 123 is irrelevant to the respondent. A

[20] Apart from the above arguments, the respondent reiterated the petitioner's arguments ie on res judicata and laches. B

FINDINGS

Res judicata

[21] Under this head of argument the liquidator for the respondent firstly argued that the applicant's application ought to be dismissed in limine as the applicant's grounds have been raised and ventilated in the stay application vide notice of motion dated 13 June 2016 ('encl 93/the stay application' as the case maybe), namely, based on the witness statements in Suit No 291 and statement of claim in Suit No 123, the liquidator has failed to verify the petitioner's POD and has merely accepted the same. To draw home the point the liquidator for the respondent relied on the table of comparison of 'Applicant's allegations in the s 279 notice of motion' and the 'Evidence of Re-Litigation — Similar Allegations in Previous Proceeding (encl 93)' tendered to the court during the proceedings on 19 September 2016. C D E

[22] Secondly, the stay application was fully argued and dismissed on 11 August 2016 and the issue of whether the liquidator has accepted the POD without any verification and whether the POD sum was proven have been raised and decided in the stay application; hence the application is estopped from raising the same issues again. F

[23] Thirdly in view of the court's decision on the stay application, it is abusive of the applicant to proceed with the s 279 application as it would amount to a collateral challenge on the decision in the stay application on the ground that the liquidator has failed to verify the POD. Further, the applicant has filed an appeal against the dismissal of the stay application. The applicant cannot ask two different courts to adjudicate on the same subject matter. The liquidator for the respondent relied on *Tractors Malaysia Bhd v Charles Au Yong* [1982] 1 MLJ 320 (FC) at 321E-H left column and *Tay Choo Foo v Harrisons Holdings (M) Bhd* [2001] MLJU 105; [2001] 4 CLJ 52 (HC) at pp 58i–59a–e. G H

[24] With respect I diasgreed with the submission of the liquidator for the respondent and the petitioner who adopted the former's submission. My reasons are these. I

[25] The stay application was two pronged (i) the stay application is an

application for permanent stay of winding up order under s 243 of the CA 1965; and (ii) alternatively, that all proceedings in relation to the winding up order of the respondent dated 11 June 2010 be stayed altogether or until the disposal of the notice of motion (for leave to appeal) to the Federal Court vide Civil Application No 08(i)-232–05 of 2014(W) and the disposal of any appeal to the Federal Court therefrom, or until such time, and on such terms and conditions as the court thinks fit. The test applicable is different from the s 279 application. The test in the s 243 application is not 'special circumstances' as submitted by the applicant. I had considered the principles applicable in *Abd Hamid Zakaria & Anor v Rimau Indah Sdn Bhd* [2016] MLJU 1835; [2016] 1 LNS 410 and I adopt what I have stated therein:

> 12. As to the principles applicable for allowing a stay of a winding up order under s 243(1) of the CA 1965, it would be useful to refer to the oft-quoted cases of the Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 and the High Court case of *Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, Applicant)* [1995] 2 MLJ 700.
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> 12.1 In *Vijayalakshmi Devi* at pp 716–718 the Federal Court considered the leading case of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 on the principles which govern the court in the exercise of its jurisdiction whether to grant or refuse a stay and opined that in summary the principles which emerged from the aforesaid authorities which however are not meant to be exhaustive are:
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> (1) The granting of a stay under s 243 of the CA 1965 is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
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> (2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.
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> (3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.
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> (4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.
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> 12.2 In *Ting Yuk Kiong*, Arifin J (now CJ), observed that s 243(1) of the CA 1965 is substantially similar to s 256(1) of the English Companies Act 1948 and that the latter section was examined in the case of *In Re Calgary and Edmonton Land Co Ltd (In Liquidation)* [1975] 1 All ER 1046 at para 1050. His Lordship at 706C–E stated that In *Re Calgary*, the court dismissed the application for stay of the winding up proceedings and it was held, inter alia:
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> (1) the court would in normal circumstances, generally exercise its discretion to grant a stay only where the applicant showed: (a) that each creditor had either been paid in full or that satisfactory provision for him to be paid in full was to be made, or that he consented to the stay or was otherwise bound not to object to it; (b) that the liquidator's position was fully safeguarded, either by paying him the proper amount of his expenses or sufficiently securing payment; and (c) that each member either consented

to the stay, or was otherwise bound not to object to it, or there was secured to him the right to reserve all that he would have received if the winding up had proceeded to its conclusion.

12.3 Further His Lordship at p 705 quoted with approval the following principles which the court has to consider in exercising its discretion for stay of further proceedings of the winding up established from decided cases which were cited in *Re Warbler Pty Ltd* (1982) 6 ACLR 526:

(a) the granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co Ltd (In Liquidation)*;

(b) there must be service of notice of the application for a stay on all creditors and contributories and proof of this (*Re South Barrule State Quarry Co* (1969) LR 8 Eq 688, *Re Bank of Queensland Ltd* (1870) 2 QSCR 113 referred to);

(c) the nature and extent of the creditors must be shown and whether or not all debts have been discharged. (*Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 at p 694; *Re Dalta Homes Pty Ltd* [1972] 2 NSWLR 22 at p 26 referred to);

(d) the attitude of creditors, contributories and the liquidator is a relevant consideration. (*Re Calgary and Edmonton Land Co Ltd (In Liquidation*) referred to);

(e) the current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought. (*Re A Private Company* [1935] NZLR 120; *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at p 598 referred to);

(f) if there has been non-compliance by the directors with their statutory duties as to the giving of information or furnishing a statement of affairs, a full explanation of the reasons and circumstances should be given. (*Re Telescriptor Syndicate Ltd* [1963] 2 Ch 174 referred to);

(g) the general background and circumstances which led to the winding-up order should be explained. (*Krextile Holdings Pty Ltd v Widdows* referred to); and

(h) the nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to 'commercial morality' or the 'public interest'. (*Krextile Holdings Pty Ltd v Widdows, Re Dalta Homes Pty* referred to).

In the s 279 application the test is whether the liquidator acted in a manner no reasonable liquidator would have acted in the circumstances (will elaborate later). Since the tests applied are different, in my judgment the issue of res judicata does not apply. In this regard I draw support from the case of *Joseph bin*

Paulus Lantip & Ors v Unilever Plc [2012] MLJU 1759; [2012] 7 CLJ 693 (FC) where the issue raised in the appeal is whether the doctrine of res judicata would apply so as to bar the application under O 18 r 19(1) of the Rules of the High Court 1980, in the circumstances where an application by a party to set aside the leave for service out of jurisdiction under O 12 r 7 of the RHC had earlier been dismissed by the court. The Federal Court held:

> O18 r 19(1) of the RHC application involves a different exercise from that of O 11 of the RHC. In the latter case, the court merely considers whether it could exercise jurisdiction over the fourth defendant. *Whereas, in the O 18 r 19(1) of the RHC application, the court needs to consider whether or not, on the merits, the plaintiffs' claim is sustainable, vexatious or otherwise an abuse of the process of court*. In the present case, when the High Court heard the fourth defendant's application under O 12 r 7 of the RHC, it had examined and adjudicated on the issue of whether the plaintiffs' claim, assuming it to be true, would attach liability against the fourth defendant and that liability is within the territorial jurisdiction of the court. *At that stage, the court did not examine and adjudicate on the merits of the claim*. (Emphasis added.)

(per Arifin Zakaria CJ at pp 712–713 at para 48).

[26] In the stay application, whilst one of the grounds was 'The current liquidator has not verified the petitioner's claim and has merely accepted the same', the applicant primarily relied on:

(a) there is a 'clash of liquidators' in that the ultimate liquidator for the respondent has not been decided on and is pending determination at the Federal Court;

(b) the inactivity of the current liquidator of the respondent; and

(c) the fear of dissipation of judgment sum currently held under the joint stakeholders account.

[27] The evidence of the conduct and the considerations of the liquidator on admitting the POD which is central in encl 97 was not put before the court in encl 93 and no submission on s 279 was made before the court. In these circumstances, I agreed with the applicant that the present case is distinguishable from the principles propounded in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC) at p 201F where the applicant '... comparing the pleadings of the action before him and the pleadings in the previous county court proceedings, that the issues of fact and the evidence to support them were identically the same (*Bell v Holmes* [1956] 1 WLR 1359) ...'.

[28] Assuming I am wrong and the doctrine of res judicata applied, I agreed with the applicant's submission that 'the implication would be that the liquidator accepts the applicant's contention that he admitted the POD

wrongly given that the liquidator did not produce any evidence in encl 93 to rebut the applicant's contention in encl 93'. A

Furthermore, the only positive assertion made by the liquidator on the issue of acceptance of Lim Chiew's POD was:

> 34. Paragraph 20 of the applicant's Affidavit is denied. I state that the applicant's averment is but a mere speculation of probabilities. I am also advised by the Respondent's solicitors and verily believe that the applicant's fear of losing and the unknown does not constitute any proper ground to apply for stay of winding up. B

(encl 99, liquidator's affidavit in reply affirmed on 15 July 2016 in opposing the applicant's affidavit in support of encl 93). C

[29] The petitioner relied on the case of *Chemfert Sdn Bhd & Anor v Lim Hua* [2010] 5 MLJ 228 where, amongst others, the Court of Appeal at p 238 para 23(q) held: D

> (q) Res judicata for this purpose is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them: per Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 and quoted with approval in the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; [1975] 2 WLR 690 (see also *SCF Finance Co Ltd v Masri and another (No 3)* [1987] QB 1028; [1987] 1 All ER 194 (CA); *Bell v Holmes* [1956] 3 All ER 449; [1956] 1 WLR 1359; and *Hoystead and others v Commissioner of Taxation* [1926] AC 155. E F

[30] With respect in my judgment *Chemfert*'s case can be distinguished as submitted by the applicant:

> The appellant had filed a petition under s 218 of the Companies Act 1965 and the same was adjudged and resulted in a consent order with no liberty to file afresh. Subsequently, the Appellant filed a petition seeking to be reinstated to the company's board of directors under s 181 of the Act premised on the same facts and allegations in the first petition, where the Court of Appeal found that '... In the first petition there was nothing to prevent Lim Hua from including a prayer which he attempted to obtain in the instant petition ...'. This is not the case here as the applicant could not have included a prayer in encl 93 seeking the relief as prayed for in encl 97. To do so would have been an abuse of process. G H

[31] Further, given that the applicant has withdrawn its appeal in respect of encl 93 on 23 February 2017, I am of the view the contention that the s 279 application would amount to a collateral challenge on this court's decision in the stay application is a non-issue. I

Laches have set in to deny the applicant his remedy

[32] The applicant submitted that laches does not apply because there is no time provision under s 279 of the CA 1965 and as such an application can be made thereunder at any time. In support of this proposition, the case of *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 at p 254; [1989] 1 CLJ Rep 378 at p 381d–e was cited where the learned judge held:

> However, in this case, the court also observed that there was a provision of statutory bar, ie s 9 of the Limitation Act 1953, and the defence of laches would not have applied in any event for the plaintiffs should be entitled to the full statutory period before their claim became unenforceable. Please see *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1962] 1 WLR 86 at p 115 and *Tan Tuan Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276.

[33] With respect I could not agree with the applicant's submission. In this regard I agreed with the liquidator for the respondent and the petitioner's reliance on *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor* [2007] 3 MLJ 571; [2007] 7 CLJ 516 for the proposition that inordinate or unresonable delay (1 1/2 years) would be a relevant factor (per Ramly Ali J (now FCJ) at p 594 (MLJ); pp 549–550 (CLJ) paras 94–96. This is because on the merits of the application to challenge the decision of the liquidator in selling the said lands under s 236(3) of the CA 1965 and s 279 of the same. The court dismissed the applicant's application on the merits as the applicant failed to meet the threshold required to justify interference of the court:

(a) the applicant has failed to establish that the liquidator had not exercised his discretion bona fide or that he had acted in a way in which no reasonable liquidator could have acted;

(b) the balance of justice of the case is against the setting aside of the sale of the said land;

(c) there was unreasonable delay in the filing of encl 37 to which the applicant has not and cannot explain; and

(d) the applicant failed to establish that he was aggrieved by the decision of the liquidator in selling the said land at RM17,900,000.

[34] Further it is instructive to refer to *Choong Howei v Cheah Choo Eng & Ors and another appeal* [2015] 6 MLJ 95; [2015] 9 CLJ 689 where the Court of Appeal, amongst others, cited with approval the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ 693 where Edgar Joseph Jr J (as he then was) at p 237 (MLJ); p 704 (CLJ) para 44 held as follows:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. *In determining whether there has been such a delay as to amount to laches the*

> *court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant*. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: *14 Halsbury's Laws of England* (3rd Ed) paras 1181–1182. Laches has been succinctly described as 'inaction with one eye's open'. (Emphasis added.)

(see also *Cheah Kim Tong* at p 381b–c; *Lim Teow Yong & Sons Sdn Bhd v Infolity Sdn Bhd & Anor* [2015] MLJU 2312; [2015] 1 LNS 311 (HC) at pp 15–19 of the report; *Chew Choo Sing @ Chiew Peng Ann v Chew Brothers Development Corporation Sdn Bhd & Ors* [2007] 8 MLJ 393 at pp 409–410; [2007] 9 CLJ 81 at p 106 paras 37–38).

[35] Having regard to the principles governing the equitable defence of laches and turning now to the factual matrix of this instant case, with respect I could not agree with the submission of the liquidator for the respondent and the petitioner that the applicant (i) 'is guilty of laches of approximately three years and nine months after the applicant, as defendant in Suit No 291, found out about the admission of the POD from the witness statements of the petitioner and the liquidator both dated 8 October 2012'; and (ii) the applicant has failed to explain the reason for the inordinate delay. I find there is no evidence of laches for the following reasons.

[36] The applicant was only adjudged a creditor on 15 December 2013 (the date of grounds of judgment of Has Zanah J in Suit 291): that was the earliest date the applicant was clothed with the requisite locus standi. Neither the liquidator nor the applicant has shown prejudice to them or asserted that they relied on the applicant's lack of action and have altered their position as such.

[37] There could not be acquiescence as:

(a) there has been no distribution of dividend of the respondent to date;

(b) the liquidator has not conducted a proof of debt exercise as required under s 291 of the CA 1965 and in accordance with rr 91–100 of the Companies (Winding-Up) Rules 1972 ('the CWUR'). Although the liquidator claimed that he advertised for a proof of debt exercise, no evidence of any notices to creditors nor any *gazette*, as required under r 91 of the CWUR have been shown. We can only conclude that this was not done;

(c) the liquidator has not completed the verification of the applicant's POD and that of Foremost Systems Sdn Bhd and Deck Master Sdn Bhd. Furthermore, the following circumstances as at the hearing of encl 97

ought to be taken into account:

32.1 On 8/2/2013, an application was made by the contributory of the Respondent for the removal of the Liquidator. On 18/6/2013, this Court ordered the joint appointment of Chang Chee Ching as the joint liquidator.

32.2 The joint liquidator then attempted to obtain the books and records of the Respondent from the Liquidator but the Liquidator resisted.

32.3 On 8/4/2014, the Court of Appeal reversed the decision of this court and removed the joint liquidator on the basis that the contributory did not possess the requisite locus standi as the shares were transferred to him after the commencement of winding up and was thus void.

32.4 In the meantime, the applicant appealed against the decision in Suit 291 and the same came up for hearing on 29/10/2015. An application for leave to appeal to the Federal Court is now fixed for hearing on 5/10/2016.

32.5 There was also an application to commit the Liquidator for lying under oath and this is also pending leave to the Federal Court and the hearing is also fixed on 5/10/2016.

Therefore it cannot be said there is acquiescence on the part of the applicant whereby '(T)here is a completed violation of rights and (the applicant) has become aware of it (and) assents to it, or his delay in asserting his right has been so long as to give rise to an inference of such assent' (per Peh Swee Chin J (as he then was) in *Cheah Kim Tong*).

Failure to prove under s 279 of the CA 1965

[38] There are a plethora of cases on the applicable law governing an application under s 279 of the CA 1965 which include *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12 at pp 20–21 para 15; [2007] 2 CLJ 405 at pp 419–420 para 10 (CA), *Koh Huat Kwan v Pegawai Penerima selaku pelikuidasi bagi Poh Mah Housing Development Sdn Bhd & Ors* [2015] 5 MLJ 323 at p 331; [2015] 7 CLJ 16 at p 24 (CA) para 16, *Abric Project Management Sdn Bhd* at p 582–583 (MLJ); p 533 (CLJ) para 37. The principle is that the court will not interfere with the exercise of the liquidator's powers, acts or decisions unless the applicant can show that the conduct of the liquidator falls under the following categories:

(a) the liquidator did not address himself to the correct questions;

(b) the liquidator has made errors of law;

(c) the liquidator has acted fraudulently;

(d) the liquidator was not bona fide in his conduct;

(e) the conduct of the liquidator was so utterly unreasonable and absurd that no reasonable person would so act; or

(f) the liquidator has taken into consideration entirely irrelevant considerations.

[39] The liquidator for the respondent and the Petitioner submitted the applicant has not adduced any credible evidence nor prove: (i) the liability referred in the POD is not the true liability of the respondent company enforceable against it; and (ii) the liquidator has not acted correctly in admitting the POD. In support thereof the case of *Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242; [2016] 2 AMCR 174 was cited where the Court of Appeal observed that s 279 of the CA 1965 has its equivalent provision in s 168(5) of the Australian Corporations Act 2001 and approved of the discussion of the Australian provision in *McPherson's Law of Company — Liquidation* (3rd Ed) by Andrew R Keay at pp 603–604 which, amongst others, stated:

> The applicant has the onus of proving that the decision of the liquidator was wrong and he or she should demonstrate in a supporting affidavit that the application has merit by setting out in the affidavit facts which should give rise to an argument ...

[40] As highlighted by the applicant, I find *Angkutera*'s case aids the applicant in that the Court of Appeal at p 250 (MLJ); p 180 (CLJ) para 19 approved of the principle in *Chin Ah Keow @ Chin Lai Sitt v Anggun Pintas Sdn Bhd & Ors* [2005] 4 MLJ 747 at p 757; [2005] 4 AMR 464 at p 473 and stated:

> The function of the court under s 279 of Act 125 was to hear the matter as a strict appeal from the decision of the liquidator. The powers given to the court were to consider whether the act or decision of the liquidator was right or otherwise. To do this the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising.

[41] With respect the case of *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1 is irrelevant as it pertains to last minute amendment of pleadings and the 'bare allegation' affidavit referred to was the affidavit of the defendant in support of its application to amendment which did not explain why the application to amend was made at the eve of trial (p 6 para 7). I wholly agreed with the applicant that the law governing amendment to pleadings does not apply to an application under s 279. What is material in my view is the affidavit in support affirmed by the applicant on 11 July 2016 sets out the grounds relied on by the applicant. Bearing in mind that the relevant consideration is 'the circumstances which were before the

liquidator at the time of his act or decision and not the circumstances susequently arising', I am of the view that there is no lack of particularisation in the affidavit in support of the s 279 application as the liquidator could not and did not know what factors the liquidator had allegedly considered when accepting Lim Chiew's (peitioner) POD until the liquidator disclosed for the first time, the copy of Lim Chiew's POD in the liquidator's reply affirmed by the liquidator on 29 July 2016 when it only then evident that the liquidator relied on the statement of claim in Suit No 123.

Lim Chiew's claim is genuine

[42] The liquidator for the respondent and the petitioner submitted that the liquidator has rightly admitted Lim Chiew's POD (exh S3, liquidator's reply) for the following reasons as reproduced:

(a) The entire foundation of the Application is a blunder, ie 'the claim in Suit No 123 was for RM6,334,674.51 as loss of profit or damages (the claim is vague) ... Lim Chiew did not and in fact could not prove his claim ...' Contrary to the applicant's averments, the circumstances and investigation leading to the admission of the POD by the Liquidator are set out below.

(b) Upon receipt of the POD exhibiting a statement of claim setting out incidences relating to the Respondent, the Liquidator carried out an investigation.

(c) The Liquidator found evidences of a JVA between the Respondent and the Petitioner through his investigation into the Respondent's affairs. The Liquidator found that (1) the Respondent is in charge of a construction of a Kuala Lipis factory; (2) from around 2003 to 2004, the Petitioner has made various payments by cheques to the Respondent amounting to RM7,500,000 pursuant to a JVA; and (3) queries to Michael Yong, a former director of the Respondent, confirm the same.

(d) Further, Michael Yong has confirmed the amounts stated in the breakdown of construction costs and the amount due to the Petitioner, ie RM6,334,674.51 under the JVA and as claimed in Suit 123.

(e) In fact, the sum of RM6,334,674.51, which constitutes the amount claimed by the Petitioner in Suit 123, is supported by a breakdown of the construction costs which detailed the profits made from the construction and all payments made by the Respondent as costs of the construction under the JVA. Notably, debts arising from profits in fact made are not a 'loss of profits' claim which is unliquidated damages.

(f) In addition, Michael Yong, in his letter dated 30/8/2016, again emphasised that the Respondent should be held solely responsible.

[43] With respect I find the aforesaid submission that Lim Chiew's claim is genuine cannot be sustained. My reasons are these.

[44] The basis of Lim Chiew's POD is the JVA between himself and the respondent in respect of the Kuala Lipis Project from Meico Chipboard Bhd. Lim Chiew claimed he provided the funding and that he was entitled to 50% of the profits derived from the project. I find Lim Chiew's claim in Suit No 123 is accompanied only by the statement of claim in Suit No 123. Premised on para 21 of the statement of claim it is apparent that his claim is for damages and/or unliquidated amount that has yet to be proven as submitted by the applicant:

22.1 Lim Chiew claims that there was a joint venture agreement for the development of the Project between himself and the Respondent. No joint venture agreement or any document of that nature to evidence this was ever given to the Liquidator.

22.2 The claim is 50% of the nett profit of the Respondent derived from the Project (paragraph 10(iii) of the Statement of Claim). Hence, the audited accounts should have been submitted to the Liquidator or the Liquidator could have extracted this from the CCM. This would show the nett profits of the Respondent. Again this was not done.

22.3 Lim Chiew claims that the amount of RM12,669,349.03 (para 18 of Statement of Claim) was fraudulently paid out of the Respondent. Since fraud is alleged, it is incumbent on the Liquidator to delve deeper into the matter.

22.4 Lim Chiew claims that this figure of RM12,669,349.03, is inconsistent with the audited accounts of the Respondent (para 19 of Statement of Claim). Again, no proof of this was tendered to the Liquidator.

22.5 Lim Chiew prays for inter-alia, the following remedies in the Statement of Claim:

(i) An account of profits be taken on the Respondent;

(ii) An account and inquiries of the amounts due to Lim Chiew;

(iii) Damages to be assessed;

(iv) Interests and costs.

(v) (para C of Statement of Claim)

22.6 Lim Chiew also claims as an alternative, the sum of RM6,333,674.51 as the nett profits due to him but this is obviously unsustainable as this figure is derived from 50% of the sum paid out the various parties and not from the actual profits of the Respondent (para B of Statement of Claim).

In this regard I relied on the meaning of 'debt' or 'liquidated demand' where VC George J (as he then was) in *Mahindar Singh v Amanah Saham Pahang Bhd & Anor* [1984] 2 CLJ Rep 205 at p 208 a–b stated:

A liquidated demand is in the nature of a debt, ie a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes 'damages'.

The words 'debt or liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure (*Knight v Abbot* (1882) 10 QBD 11). The Supreme Court Practice 1979 Vol para 6/2/4A. (Emphasis added.)

(see *Seok Mee Seong v Abdul Wahab bin Abdul Rahman* [1989] 1 MLJ 193 at p 194; [1988] 2 CLJ Rep 415 at p 417 following *Mahindar Singh*).

[45] The respondent (first defendant in Suit No 123) denied Lim Chiew's claims in its defence (exh LCY6 of the applicant's affidavit in reply No 1 affirmed by the applicant on 17 August 2016). Based on the notes of proceeding in Suit No 123 as at 21 June 2010 (exh LCY7), I find what transpired is as averred by the applicant at para 11 of applicant's affidavit in reply No 1 as follows:

There was no such direction given by the trial judge in Suit No 123 to Lim Chiew for him to file his Proof of Debt. In fact, it was Lim Chiew's solicitor, Mr AI Nathan of Messrs AI Nathan who informed the court that the Plaintiff therein, ie Lim Chiew will be filing a Proof of Debt in respect of his claim against the Respondent who was wound up on 11/6/2010. The trial court merely acknowledged the statement made by the solicitors for Lim Chiew at that material time. Therefore Lim Chiew on his own volition, withdrew Suit No 123.

[46] Whilst the liquidator contended he carried out investigations in respect of Lim Chiew's POD, I find no particulars of the alleged 'investigations' have been provided such as where the liquidator obtained the information on the alleged joint venture and the agreement that profits would be shared on a 50–50 basis.

[47] I find the 'breakdown of Construction Costs' (exh S5) cannot be deemed as proof of Lim Chiew's claim as (i) the author of the document is unknown; (ii) it has not been verified nor certified by an engineer, architect or quantity surveyor; and (iii) it does not show the alleged profits of RM6,334,674.51 due to Lim Chiew in any manner whatsoever. The said document is at best a self serving document (see *Chandran G Nair & Ors v Affin Bank Bhd* [2015] 1 MLJ 59 at para 38(i) p 71).

[48] Regarding the liquidator's claim that the ex-director of the respondent company, Michael Yong has 'confirmed' the 'breakdown of Construction Costs' and the sum allegedly due to Lim Chiew is RM6,334,674.51, I am

inclined to agree with the applicant that Michael Yong is in no position to confirm such matters as he has denied Lim Chiew's claim as is evident from his defence in Suit No 123. This has been correctly identified by the applicant as submitted below:

27.1 Michael Yong denies the existence of any joint venture agreement (paragraph 6);

27.2 He denies any payment or investment by Lim Chiew into the Respondent (paragraph 8);

27.3 He denies any agreement with Lim Chiew on the sharing of profits for the Project (paragraphs 10 and 11);

27.4 He denies the existence of any accounts in particular, the existence of the 'breakdown of Construction Costs' (paragraph 12);

27.5 He asserts that the profits of the Respondent are as stated in the audited accounts of the Respondent and not as stated in the breakdown of Construction Costs (paragraph 13);

27.6 He denies having any knowledge on the alleged breakdown of Construction Costs (paragraph 14);

27.7 Michael Yong goes on in the remaining paragraphs to deny any amount owing to Lim Chiew whatsoever and places the burden of proof on him (paragraphs 15 to 24).

Indeed it is questionable how the liquidator could have accepted Michael Yong's 'confrmation' of the 'breakdown of Construction Costs' and the amount due to Lim Chiew in the face of Michael Yong's denial of having knowledge of the same. Further, after Suit No 123 was settled with all the defendants therein, Michael Yong maintained that he was not part of the settlement. Based on his letter dated 29 June 2010 to Messrs Tharkurta Low & Rajendra, solicitors acting for Michael Yong and the applicant, it could be inferred that that Michael Yong still denied Lim Chiew's claim. The liquidator referred to the letter from Michael Yong dated 30 August 2016 in response to his (liquidator) request for clarification of the latter's letter dated 29 June 2010. The liquidator averred Michael Yong clarified as follows:

(a) He was not agreeable to the settlement then as it was only for the purpose of settling a contempt committed by the applicant.

(b) The settlement was personal to the applicant.

(c) He merely wished to proceed with the matter as he should not be held personally liable.

(d) It was the Respondent that should be held solely responsible.

(e) The matter has since been fully settled between the individual directors and the Petitioner.

However the applicant proffered an explanation in para 13 of the applicant's reply No 3 affirmed by the applicant on 9 September 2016 that:

> The truth of the matter was that Michael Yong participated and was privy to the settlement but he changed his mind after the settlement had been achieved. He refused to pay his portion of the settlement which was RM350,000.00. As a result of the settlement, Suit No 123 was withdrawn against all the Defendants including Michael Yong. Thus Michael Yong derived the benefit of the settlement but refused to meet his end of the bargain. I ultimately bore the entire RM1.1 million in settlement.

In the light of Michael Yong's 'change of attitude' and the fact that his clarification with regard to his 29 June 2010 letter was only sought by the liquidator on 23 August 2016 and considering the fact that the liquidator was appointed pursuant to the winding up order of the respondent on 11 June 2010, I have my reservation on the weight to be given to Michael Yong's clarification letter dated 30 August 2016.

It begs the question of why did the liquidator not clarify with Michael Yong soon after his appointment or anytime in 2010 when he received Lim Chiew's POD for RM6,893,838.23 (exh S3) dated 21 June 2010 which according to the liquidator 'upon receipt of the POD, (he) carried out some investigation for the purpose of examining the POD' rather than on 23 August 2016 ie when the s 279 application which was filed on 11 August 2016 was afoot? In any event following *Angkutera*'s case, the court ought to have regard to 'the circumstances which were before the liquidator at the time of his act or decision and not the circumstances subsequently arising'.

The settlement with the defendants in Suit No 123 is irrelevant

[49] The liquidator for the respondent and the petitioner submitted that nothing turns on the the applicant's point that Suit No 123 was withdrawn. It is my respectful view there is significance in the fact that the entire suit was withdrawn against all the defendants in Suit No 123 as is apparent from the exchange of correspondences contained in exh LCY5. This because RM1.1m was paid to Lim Chiew in settlement of Suit No 123. I am inclined to agree with the applicant's submission that the sum of RM6,333.674.51 claimed under the POD should at the very least have the sum of RM1.1m deducted or alternatively, the entire claim has been setled or compromised by Lim Chiew's acceptance of the said sum of RM1.1m. This to my mind was not considered by the liquidator.

CONCLUSION

[50] For the foregoing reasons I find:

(a) the issue of res judicata does not arise;

(b) there is no evidence of laches;

(c) the applicant has satisfied the threshold test under s 279 of the CA 1965 of showing that the Liqudator's conduct fell under categories (a), (b) and (f) mentioned in para 30 above which warranted this court to interfere with the exercise of the liquidator's decisions.

[51] In submission the applicant prayed for the following:

33.1 The decision to admit the POD be reversed entirely.

33.2 The decision to admit the POD be modified on the basis that Lim Chiew prove his claim in court and all payments of dividend be stayed or suspended pending the same (this was what was decided in *Torita Rubber Works Sdn Bhd v Chew Chong Eu* and in *Erpima SA v Chee Yoh Chuang* And Another but the authority of Watta Battery takes the opposite view in that, once the claimant (Lim Chiew) opts to prove his debt by way of proof of debt, he loses the right to prove the same in a civil suit), or

33.3 The Liquidator and/or Lim Chiew be directed to apply to court under the relevant provisions of the Companies Act, 1965 to determine Lim Chiew's claim and all payments of dividend be stayed or suspended pending the same.

[52] Having regard to the circumstances in this case I allowed the appilcant's application in encl 97 as per the terms stated in para 2 above.

Enclosure 97 allowed.

Reported by Dzulqarnain Ab Fatar